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IN THE

Supreme Court of the United States

October Term, 1967

No. _____

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; J. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

Petitioners,

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSONS DISTRIBUT-

ING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on May 15, 1967.

CITATIONS TO OPINIONS BELOW

The decision of the District Court for the Northern District of Oklahoma is not reported. The opinion of the Court of Appeals for the Tenth Circuit printed in the Appendix hereto is reported in 377 F. 2d 901.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether or not the jurisdictional element of interstate commerce within the meaning of Section 1 of the Sherman Act, 15 USC 1, was proved by petitioners.

STATEMENT

The petitioners, a group of Oklahoma liquor retailers, brought suit against Oklahoma liquor wholesalers to enjoin an alleged market division violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The Trial Judge found that there had been a division of brands and territories; but, he held the evidence did not prove an unlawful conspiracy. He also held that the Sherman Act prerequisite involvement with interstate commerce was lacking.

Petitioners attacked the validity of the judgment as being contrary to the rule of law laid down by the United States Supreme Court in *Walling* v. *Jacksonville Paper Company*, 317 U.S. 564, and also *United States* v. *Frankfort Distilleries*, 324 U.S. 293, and contrary to the law of other circuits. *United States* v. *Chrysler Corporation Parts Wholesalers, Northwest Region, et al.*, 180 F. 2d 557; *United States* v. *South Florida Asphalt Co.*, 329 F. 2d 860; *Las Vegas Merchant Plumbing Ass'n* v. *United States*, 210 F. 2d 732.

REASONS FOR GRANTING THE WRIT

The judgment of the District Court as affirmed by the Court of Appeals for the Tenth Circuit is contrary to the rule of law laid down by the United States Supreme Court in the *Walling* case. As noted above, it is also contrary to the law of other circuits. By reason of this conflict and confusion, enforcement of the Sherman Act is more difficult, both for private litigants, as well as the Anti-Trust Division of the Department of Justice of the United States.

This conflict and confusion, should be clarified by the United States Supreme Court.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT S. RIZLEY
1414 First National Building
Tulsa, Oklahoma
Counsel for Petitioners



APPENDIX

Filed United States Court of Appeals, Tenth Circuit
May 15, 1967. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
MARCH 1967 TERM

No. 8662

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; J. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

Appellants,

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and

GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSONS DISTRIBUTING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Robert S. Rizley for Appellants.

Irvine E. Ungerman and James L. Kincaid (William Leiter and David C. Johnston, Jr. with them on brief) for Appellees.

Before MURRAH, Chief Judge, BREITENSTEIN and HILL, Circuit Judges.

MURRAH, Chief Judge.

A group of Oklahoma liquor retailers brought this suit to enjoin an alleged market division violation of §1 of the Sherman Act, 15 U.S.C. 1. The retailers alleged that the sixteen Oklahoma wholesalers conspired to and did in the early part of 1964 divide the Oklahoma wholesale liquor market, both territorially and according to brands. Specifically, it was alleged that the defendants conspired to unlawfully divide the wholesale market in alcoholic beverages transported in a continual flow of interstate commerce from other states into Oklahoma for resale to Oklahoma retailers and ultimately to the Oklahoma consuming public. There was also language in the

complaint which could be taken as an allegation that even if the interstate movement of alcoholic beverages terminated at the wholesale warehouse, the conspiracy nevertheless adversely affected the free flow of interstate trade and commerce in the commodity. Trial was to the court. Judge Bohanon found that there had been a division of brands and territories. But, he also found that the evidence fell short of proving an unlawful conspiracy or understanding to divide those brands and territories; that the Sherman Act prerequisite involvement with interstate commerce was also lacking; that since in any event market division had admittedly ceased by the time of trial there were no acts or threatened acts to enjoin and the matter of an injunction was, therefore, moot.[1] Judgment was entered for the wholesalers. We affirm on the sole ground that the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce.

Some exposition of the market division found by the trial court may provide helpful background to our consideration of the interstate commerce issue. The record

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1 At the trial, the retailers requested permission to amend their prayer for relief to include damages. They pointed out that they had alleged damages in their complaint, and stated a desire to amend so that if the court found a violation they could go ahead with proof of damages. The wholesalers strenuously objected. No express ruling was made on the request; in any event the prayer was not amended. However, in announcing his decision the court stated at the outset that "***early in this case there was the question of injunction. I think, as you mentioned a while ago, Mr. Rizley, that should the court find evidence sufficient to issue an injunction, the question of damages would follow. Notwithstanding that fact, the only pleadings before the Court at this time deal with the request on the part of the Complaint for injunctive relief." Thus, the court seemed to feel that if liability existed, proof of damages would be in order.

reveals that during most of 1964 the wholesalers confined themselves to selling within more or less well defined geographical areas and that within those areas they confined themselves, at least insofar as the leading brands of liquor are concerned, to selling certain labels. More specifically, it appears that the six wholesalers from Oklahoma City sold in one area, the six from Tulsa in a second, the two from Lawton in a third and the two from Ponca City and Enid in a fourth. In the latter two areas the brands were fairly evenly divided between the two wholesalers operating in each; in the former two areas, serviced by six wholesalers, the brands were usually divided three ways so that within the area any one brand was carried by only two wholesalers. There may have been occasional voluntary deviations from this mode of operation, but the "voluntary franchise" system, as it became popularly known and as we have it set out, was the normal manner of doing business during the period in question. This mode of operation ceased in November or December of 1964 about the time two other wholesalers commenced operation and also about the time this case was nearing trial.

Addressing ourselves to the threshhold question of interstate commerce, we consider first the retailers' primary contention based on the alleged "in commerce" or continuous flow theory of their case. The retailers point out that all alcoholic beverages[2] consumed in Oklahoma

2 Spirits, wines and cordials.

are imported from out of state[3], and argue that the liquor passes from distiller to wholesaler to retailer to consumer in one continuous flow; that not until it reaches the consumer does the flow terminate; and that, therefore, the alleged conspiracy to divide the wholesale market operated upon the goods while still in interstate commerce. The trial judge held otherwise. He referred to the statutes regulating the Oklahoma liquor industry, 37 O.S. 1961, §§501-570, and the implementing rules and regulations of the Oklahoma Alcoholic Beverages Control Board under which liquor coming from out of state is required to be received into the wholesale warehouse where it is subject to strict inventory reporting requirements and where it remains for varying lengths of time until shipped out pursuant to retail order. From this he concluded that interstate commerce in the alcoholic beverages ended when they came to rest in the wholesale warehouse and subsequent transfers were in intrastate commerce.

It cannot be doubted that liquor consumed in Oklahoma remains for varying lengths of time in the wholesale warehouse. The question, as we shall see, is whether its interstate movement ends there or whether this coming to rest is but a temporary stopover in a continual flow of commerce which terminates at some point further down the distribution line.

We hold that the decision on the in commerce issue is controlled by Walling v. Jacksonville Paper Company, 317 U. S. 564. Although that was a Fair Labor Standards

3 Purchases by Oklahoma wholesalers in 1964 amounted to some 44-45 million dollars.

Act case, it is basic that the reach of the Sherman Act and the Fair Labor Standards Act is coextensive insofar as the regulation of goods moving in commerce is concerned —in enacting both statutes Congress exerted the full measure of its in commerce powers. Cf. Walling v. Jacksonville Paper Company, supra, and Kirschbaum Co. v. Walling, 316 U.S. 517, with United States v. Frankfort Distilleries, 324 U.S. 293.[4]

Mr. Justice Douglas in Walling described the fullness of the exertion of the congressional power to regulate goods moving in interstate commerce by declaring that

> "* * * once the goods [enter] the channels of interstate commerce, [there is no indication that] Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. * * * if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

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4 While the Fair Labor Standards Act is inapplicable to local activities which affect interstate commerce, the Sherman Act is concerned with activities both in and affecting interstate commerce, i.e. see United States v. Frankfort Distilleries, supra.

The retailers adopt this language as a charter for their lawsuit and contend that there is a "practical continuity of movement" of the liquor until it reaches the Oklahoma consumer for whom it is intended; that the temporary stoppage of the liquor in the wholesale warehouse is only a convenient intermediate step in its contemplated interstate movement. But, Mr. Justice Douglas did not stop with his basic statement of principles which as a general statement does support the retailers position. He proceeded to particularize in three categories the special circumstances under which goods moving from out of state to an in state wholesaler for redistribution in state may be said to have the requisite practical continuity of an interstate movement. Included are goods purchased by wholesalers (1) to fill a special order, (2) under a contract or understanding by which the wholesaler has agreed to fill the needs of a particular customer, or (3) to fill the anticipated needs of a particular customer although no contract or understanding to do so exists. The evidence was clear in Walling that the respondent handled certain goods coming within the first two categories, and the court held that employees working on such goods were covered by the Act. But, crucially apropos our case, the court found the evidence insufficient to show that another mass of goods fell within the third category, i. e., goods purchased without a contract or understanding but in anticipation of the needs of a specific customer. As to these controversial goods, the court thought the evidence was "* * * of a wholly general character and [lacked] that particularity necessary to show that the goods in

question were different from goods acquired and held by a local merchant for local disposition."

A number of later cases relied upon by the retailers are entirely compatible with Walling. Thus in United States v. Chrysler Corp. etc., 180 F. 2d 557, the court, citing and quoting from Walling, held the indictment legally sufficient to bring wholesale transactions in certain goods within the first two Walling categories; as to other transactions, the indictment was thought not clearly sufficient to bring them within the third Walling category. The court proceeded to determine whether it was sufficiently alleged that these latter transactions adversely affected commerce so as to bring them within the scope of the Sherman Act. See also United States v. South Florida Asphalt Co., 329 F. 2d 860. Heavy reliance is placed on Las Vegas Merchant Plumbing Ass'n v. United States, 210 F. 2d 732. In that case the indictment alleged a conspiracy to restrain the free flow of goods in commerce and alternatively alleged that if the activities were purely local, they adversely affected the free flow of goods in commerce. There was evidence that goods were shipped to the wholesaler to fill special orders placed with him by the conspiring plumbers. Goods were also shipped by the manufacturer to the conspiring plumbers on direct order. Still other goods were shipped to the wholesalers for general resale. The court found the evidence entirely sufficient to support the trade and commerce elements of the offense without specifying which particular line of evidence supported the alternative theories of the indictment.

Several other cases cited in neither brief require some discussion. Standard Oil Co. v. F.T.C., 340 U.S. 231, is entirely consistent with Walling, i. e. see footnote 6, p. 238. Not only did the gasoline remain Standard's property after it was shipped from Indiana to Detroit and was stored to await wintertime sale, but the court was careful to note that Standard could accurately estimate the demands of its Detroit customers. Thus the gasoline clearly came within the third Walling category. Indeed, Judge Minton then on the Seventh Circuit, was at pains to point out when the case was before that court that "The rest at River Rouge was not like a warehouse where the goods awaited further sale and distribution." Id 173 F. 2d 210, 213. The cases of Pevely Dairy Co. v. United States, 178 F. 2d 363; Foremost Dairies, Inc. v. F.T.C., 348 F. 2d 674; Hardrives Co. v. East Coast Asphalt Corp., 329 F. 2d 868; and Northern California Pharmaceutical Ass'n v. United States, 306 F. 2d 379, give us more pause. The two dairy cases both involve situations where milk from out of state was shipped in state to be processed for resale in state. It was not argued that the milk was purchased to meet the anticipated demand of specific customers nor was there any evidence that such was the case. But, interstate commerce was sustained on the premise that milk, a perishable commodity, flowed in a constant stream of commerce through a "negligible processing operation" to its final destination—the ultimate consumer. In the Hardrives case the court, after citing and quoting from Walling, held that a private Sherman Act complaint had been erroneously dismissed. The case involved foreign

shipments of asphalt into Florida from Venezuela. The asphalt was stored in Florida, then processed by the defendants who either resold it to paving contractors or laid it themselves. The court seems to have reversed solely because "* * * all the parties contemplated that the bitumen—or at least a substantial portion of it—would ultimately wind up as topping on the roads and streets of Florida." Id 870. But, it must be noted that although there was no allegation in Hardrives of purchases to fill the anticipated needs of specific customers, there were such allegations in the related criminal case brought by the Government. See United States v. South Florida Asphalt Co., supra. Finally, in Northern California Pharmaceutical Ass'n v. United States, supra, the court held that drugs shipped direct from out of state manufacturers to in state druggists retained their interstate character while on the pharmacy shelves, the test being "* * * what ultimate disposition of the product is contemplated by the business people involved." The court does not discuss Walling, although it does refer to United States v. Chrysler Corp. etc., supra, and speaks in terms of "practical continuity of movement." Significantly, the facts of the case also indicate that wholesalers made interstate purchases to fill special orders placed with them by retail druggists.

It may be that these cases are susceptible of an interpretation which would take them beyond the three Walling categories into the realm of a fourth category in which goods coming to rest on the shelves of the wholesale or retail establishment would remain in the stream of com-

merce if destined for ultimate general resale to the trade. But, they have not explicitly done so. Appellants do not contend for an extension of Walling, and we are unwilling to go beyond the confines of its third category which in our view was intended to establish the outer limits of the practical continuity movement concept.

The court in Walling held that goods shipped interstate to wholesalers for redistribution to the general retail trade did not remain in interstate commerce after coming to rest in the wholesalers warehouse. So it is in our case. There is no proof of any transaction coming within any of the three categories. Certainly, this record reveals no purchases to fill special orders or purchases pursuant to contract or understanding to fill the needs of specific retailers, and more importantly, there is no evidence whatsoever of non-contractual purchases to fill the anticipated needs of particular customers. The most the record reveals is that the wholesalers met the general demand for alcoholic beverages apparently replenishing their inventories when necessary. We hold that the interstate movement of the liquor ends at the Oklahoma wholesale warehouse. See Brosius v. Pepsi-Cola Co., 155 F. 2d 99; Jewel Tea Co. v. Williams, 118 F. 2d 202; Jax Beer Co. v. Redfern, 124 F. 2d 172; United States v. San Francisco Electrical Contractors Ass'n, 57 F. Supp. 57. Cf. Bank of Utah v. Commercial Security Bank, 369 F. 2d 19; Lieberthal v. North Country Lanes, 332 F. 2d 269, and cases cited at p. 271.

We now turn to a consideration of the "affecting commerce" theory. The trial court found as a fact that "* * *

interstate commerce was not and has not been affected by any actions of the said defendants", and concluded as a matter of law that "* * * the plaintiffs have failed to prove any alleged agreement or conspiracy which affected interstate commerce as defined by the Sherman Act * * *". Although this theory was stressed in the trial court, it is not vigorously pressed here. But, there are affecting commerce cases cited, and in view of this and the court's findings, we consider the issue. The proposition that intrastate activities which adversely affect interstate commerce come within the scope of the Sherman Act is established beyond question. See United States v. International Boxing Club, 348 U. S. 236; United States v. Shubert, 348 U. S. 222; United States v. Women's Sportswear Mfgr.'s Ass'n, 336 U. S. 460; Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219, United States v. Frankfort Distilleries, supra; Lorain Journal v. United States, 342 U. S. 143. But, in this case there is no importing of raw material and exporting of finished products as in Women's Sportswear; no utilization of interstate means to produce the local restraint as in Frankfort Distilleries[5];

5 The physical movement of alcoholic beverages in Frankfort Distilleries is strikingly similar to the movement in this case. In Frankfort this court, following Walling, held that the interstate shipment ended at the wholesale warehouse. Nor did we think the alleged conspiracy there operated to adversely affect the free and untrammelled flow of interstate commerce. But, the Supreme Court thought otherwise. It held that "Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts." U. S. v. Frankfort Distilleries, supra, 298. In our case it was neither alleged nor is it argued on appeal that the out of state distributors were in any way connected or involved in the alleged conspiracy—voluntarily or involuntarily.

no interstate conspiracy to exploit a local activity as in International Boxing Club and Shubert; no activities, individual or collective, which to the extent they are effective tend to reduce the revenues of a competitor putting him out of an interstate business as in Lorain Journal. And see Bank of Utah v. Commercial Security Bank, supra.

The cases closest to this one are those like United States v. Employing Plasterers Assn., 347 US 186, and Mandeville Island Farms v. American Crystal Sugar Co., supra. See also United States v. Sheffield Farms Co., 43 F. Supp. 1; United States v. Northeast Texas Chapter National Electrical Contractors Ass'n, 181 F. 2d 30; Jewel Tea Co. v. Local Unions, etc., 274 F. 2d 217; Local 167 v. United States, 291 U. S. 293. Typically, in the plastering case the allegation was that the effect of the local conspiracy was to restrain the flow of interstate commerce in plastering materials. The court reversed the dismissal of the action holding that the complaint stated a cause of action saying, "* * * it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." U. S. v. Employing Plasterers Ass'n, supra, 189.

The retailers in this case have utterly failed to prove that if, as we hold, the flow of liquor stopped at the wholesale warehouse, the alleged conspiracy nevertheless adversely affected the flow of liquor into the state. The only pertinent evidence in the record indicates that the net cases shipped to Oklahoma wholesalers increased from

885, 976 in 1963 to 891, 176 in 1964. If anything, this proves the alleged conspiracy had no effect on the flow of liquor.

The retailers seem to rest their case on the hypothesis that the mere fact of market division and the resulting reduction in the number of wholesale outlets available to the respective distillers ipso facto proved the requisite adverse effect on the free flow of liquor in interstate commerce. In other words, they seem to argue that from this single fact we must infer that interstate commerce was adversely affected. But this is not so. The single fact of a reduced number of wholesale outlets does not give rise to the necessary implication that interstate commerce was adversely affected. While a division of the market is to be sure a per se violation of the anti-trust law, i. e., see Addyston Pipe and Steel Co. v. United States, 175 U. S. 211, this postulate presupposes but does not prove the requisite connection with commerce. Even though a trivial impact on interstate commerce may be sufficient to bring the activities complained of within the purview of the Sherman Act, i. e., Cf. Wickard v. Filburn, 317 U. S. 111, 127, there was no proof whatsoever that the alleged conspiratorial market division either deterred the amount of sales distillers could make into Oklahoma or in any way reduced the price at which they could sell. As Judge Bohanon aptly put it, "The record shows that the Oklahoma sales of liquor continued to increase and grow. There is no proof here that what the defendants did was a deterrent to interstate commerce."

In this view of the case we do not express any view on the other issues raised by the retailers concerning the existence of a conspiracy to divide markets and the mootness of equitable relief.[6]

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6 The retailers also assign as error the court's failure to find a conspiracy to fix prices. The court made no finding on this issue either way, apparently because no such conspiracy was alleged. No objection was made to his failure to make a finding on the point. In any event, we also expressly refrain from expressing any view on this issue.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; I. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

Petitioners,

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSON'S DISTRIBUTING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW, JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEF

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported officially at 377 F. 2d 901 (10th Cir. 1967).[1]

QUESTION PRESENTED

Petitioners state in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit that the question presented is:

> "Whether or not the *jurisdictional element of interstate commerce* within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, *was proved* by petitioners." (Pet. p. 2.) (Italics supplied.)

We agree that the Petition seeks review only of a factual question, and respectfully submit that the Petition should therefore be denied.[2]

STATUTORY PROVISION INVOLVED

The Sherman Act, 15 U.S.C. § 1, is set out in the Appendix, *infra*, p. 1 a.

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1. Findings of fact and conclusions of law of the trial court are reported officially at 246 F.Supp. 403 (N.D. Okla. 1965).
2. 28 U.S.C.A. (1967 Supp.) S.Ct. R.19; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); Hughes, *Address to American Law Institute* (May 10, 1934), 11 A.L.I. Proceedings 313 (1934); Vinson, *Address to American Bar Association* (Sept. 7, 1949), 69 S.Ct. v, vi (1949).

STATEMENT OF THE CASE

The trial court, as a trier of fact without a jury, found that petitioners (plaintiffs) had failed to prove the existence of any conspiracy and had further failed to prove that the alleged conspiracy "affected" interstate commerce or that the alcoholic beverages (the subject of the alleged conspiracy) remained in the "continuous flow" of interstate commerce.[3]

Though the trial court's findings could have been affirmed upon any one of the foregoing grounds, the Court of Appeals,[4] in an opinion by Chief Judge Murrah, after noting the trial court's findings,[5] found that petitioners (plaintiffs) had utterly failed in their proof of the interstate commerce jurisdictional requirement in actions under the Sherman Act, 15 U.S.C. § 1,[6] and, accordingly, found consideration of the correctness of other findings of the trial court to be unnecessary.[7]

A WRIT OF CERTIORARI SHOULD BE DENIED

Essentially, petitioners assert that the alcoholic beverages, which had their origin out of state, continued in the "flow" of interstate commerce through the respondent

3. The trial court also found that the acts complained of had ceased prior to trial; that there were no acts or threatened acts to enjoin; and that the issue of an injunction was moot. (R. 67)
4. 377 F.2d 901 (10th Cir. 1967).
5. "Trial was to the court. . . . [H]e also found that the evidence fell short of proving an unlawful conspiracy or understanding to divide those brands and territories; that the Sherman Act prerequisite involvement with interstate commerce was also lacking; that since in any event market division had admittedly ceased by the time of trial there were no acts or threatened acts to enjoin and the matter of an injunction was, therefore, moot." (377 F.2d at 902-3 (10th Cir. 1967); App. 3.)
6. "We affirm on the sole ground that the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." (377 F.2d at 903 (10th Cir. 1967); App. 3.)
7. "In this posture of the case we do not express any view on the other issues raised by the retailers [petitioners] concerning the existence of a conspiracy to divide markets and the mootness of equitable relief." (377 F.2d at 908 (10th Cir. 1967).)

wholesale liquor dealers to the ultimate consumers and that the trial court erred in finding that petitioners had failed to establish that such goods remained in interstate commerce.[8]

In an attempt to establish such contention, petitioners, by supplemental brief in this Court, for the first time set forth reference to the record, a statement of some of the evidence which petitioners assert supports their contentions, and, without having made any offer of proof in the trial court, without having otherwise perfected an appeal thereon, and without having in any manner raised the issue in the Court of Appeals, assert that the trial court committed error in limiting petitioners in their proof and in excluding testimony as to the purported "continuous flow" of the alcoholic beverages.[9]

It is fundamental that alleged errors of the trial court which are not raised by an appellant in the Court of Appeals are waived, and that this Court will not review issues which are neither raised in the trial court nor in the Court of Appeals. *United States* v. *Spector*, 343 U.S. 169, 172 (1952).

Despite petitioners' assertion that the decision of the Court of Appeals is in conflict with decisions of this

8. Supp. Br. p. 5.
9. Supp. Br. pp. 4, 5-10.
It is interesting to note, in this connection, that even though petitioners' appeal from the trial court to the Court of Appeals was predicated upon alleged errors of the trial court in its findings of fact, and despite the rule of the Court of Appeals (Rule 19, 1954 Revised Rules, U.S. Court of Appeals for the Tenth Circuit, applicable to this appeal) that appellants' (petitioners') brief set forth "A concise abstract or statement of the case, with page references to the record, presenting succinctly the questions involved in the manner in which they are raised.", petitioners failed in their brief and in their supplemental brief after oral argument in the Court of Appeals to set forth any evidence or statement of the case supporting

Court and other Courts of Appeals, neither the appeal by petitioners from the trial court to the Court of Appeals nor the Petition herein raises any issue other than the correctness of the trial court's findings of fact.

Petitioners seek a writ of certiorari for the reason that the judgment as entered by the district court and as affirmed is contrary to the rule of law as set forth in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943) (Pet. p. 3) and *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) (Pet. p. 3), as well as being contrary to various cases in other circuit courts, *e. g.*, *United States* v. *Chrysler Corporation*, 180 F. 2d 557 (9th Cir. 1950) (Pet. p. 3); *United States* v. *South Florida Asphalt Co.*, 329 F. 2d 860 (5th Cir. 1964), *cert. denied*, 379 U. S. 880 (1964) (Pet. p. 3), and *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U. S. 817 (1954) (Pet. p. 3).

In the *Walling* case, *supra*, which was a Fair Labor Standards Case, 29 U.S.C. §§ 201-219, rather than one involving the Sherman Act, 15 U.S.C. §§ 1-33, the Administrator divided the goods ordered into three categories to demonstrate that the district court had improperly found that the Fair Labor Standards Act did not apply to the actions of the defendant in that case: first, those goods which were ordered from out of state to fill a particular order of a retail customer; second, those goods which were ordered under a contract or understanding by which the wholesaler had agreed to fill the needs of a particular retail customer within the state; and third, those goods which were ordered to fill the anticipated needs of a gen-

ticular customer although no contract or understanding to do so existed. This Court held that the goods purchased which fell within the initial two categories discussed above were obviously within the flow of interstate commerce and thus the Fair Labor Standards Act, *supra*, would be applicable. Insofar as the third category is concerned, the Administrator contended that where a wholesaler orders merchandise from out of state for a fairly stable group of customers whose orders to the wholesaler are recurrent, the business with these customers is in the continuous flow of interstate commerce within the meaning of the Act. This Court refused to adopt that interpretation and held that under the facts of the *Walling* case, *supra*, such goods were not in interstate commerce under the Act. Since *no* evidence was offered by petitioners in the instant case and no issue was presented to the Court of Appeals, as to the ordering methods of respondents, regardless of any categories it can readily be seen that the instant case could not be inconsistent with the *Walling* case, *supra*.[10]

10. The respondent in the *Walling* case, *supra*, also argued that once the goods entered the warehouse of the respondent the flow of interstate commerce was terminated. This was not the argument of the respondents in the instant case, and, of course, the factual circumstances are considerably different. In the *Walling* case, *supra*, after the case had gone to trial in the district court, the respondent Jacksonville Paper Company attempted to take orders which came from out of state and previously had been delivered directly to retail customers and divert them through its warehouse where a mere temporary pause occurred before they were loaded upon trucks and transmitted immediately to the customer. In such an instance, Mr. Justice Douglas concluded that the temporary pause in the warehouse under the facts of that case was not sufficient to remove the goods from the flow of interstate commerce. This conclusion is of course not inconsistent with the opinion rendered by the Court of Appeals or the factual findings made by the district court below, because no evidence was introduced by petitioners to demonstrate that there was any temporary pause in the warehouses of the defendants. For that matter, no evidence was introduced to demonstrate any of the ordering or delivery methods or practices of the respondents.

Similarly, the petitioners are incorrect in stating that the decisions of the lower courts were inconsistent with the case of *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) (Pet. p. 3). First, the issue was not whether the Government in that case failed to prove sufficient facts to establish jurisdiction in the federal court and therefore the applicability of the Sherman Act, 15 U.S.C. §§ 1-33, *but was instead whether an indictment followed by a plea of nolo contendere was sufficient to establish the jurisdictional facts.* Motions to dismiss filed by the defendants in the district court were denied but such motions were granted by the Court of Appeals. The Supreme Court in the *Frankfort* case, *supra*, directed itself to only two major issues. The Court held that the conspiracy as alleged extended beyond state lines. As a matter of fact, some of the defendants were out-of-state corporations, and in any event, the conspiracy operated to require out-of-state companies to enter into price fixing agreements with the local wholesale sellers of alcoholic beverages. Under these circumstances, the Court held that the indictment and plea of *nolo contendere* were sufficient to establish jurisdiction since obviously the effect of the alleged conspiracy extended beyond state lines and into interstate commerce. There were no such allegations in the Complaint in the instant case and no proof was presented at trial to demonstrate that the alleged conspiracy in the instant case either involved conspirators located out of state or had any effect whatsoever on interstate commerce.[11]

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11. The Supreme Court in *Frankfort* also considered the effect of the Twenty-first Amendment to the Constitution of the United States and held that the Sherman Anti-Trust Act, *supra*, was not improperly applied because the Twenty-first Amendment did not remove from Congress the power to enforce such laws through its full use of the commerce clause of the Constitution. Neither the district court nor the Court of Appeals in the instant case rested its decision upon this ground. It can therefore be seen that these decisions of the lower courts were not inconsistent with the *Frankfort* case, *supra*.

The remaining three cases cited by petitioners involving other Courts of Appeal similarly are not inconsistent with the decision of the lower courts in the instant case. The case of *United States* v. *South Florida Asphalt Co., supra,* is inapposite because there was no determination on the merits of the case. Instead the district court granted the motion to dismiss the Government's indictment for failure to state a cause of action. The order of dismissal was appealed to the Court of Appeals for the Fifth Circuit and reversed. One minor issue was whether the asphalt, a portion of the goods upon which the alleged conspiracy impinged, came to rest in the vats, and thus interstate commerce ceased. Although it is true the court concluded that the indictment was sufficient and the Government should have an opportunity to present its evidence, the question of whether the asphalt came to rest was never finally determined. *Instead, the court decided that whether the goods had come to rest and whether interstate commerce had ceased was a factual question upon which proof must be presented.*

In the instant case, petitioners were given ample opportunity to prove that a continuous flow of alcoholic beverages in interstate commerce occurred, but both the district court and the Court of Appeals for the Tenth Circuit held that the petitioners (plaintiffs) had failed to do so.

Neither does the case of *United States* v. *Chrysler Corporation, supra,* indicate that the Courts of Appeals for the Ninth and Tenth Circuits disagree upon the proper interpretation of the Sherman Act or the evidence re-

quired to be presented in order to demonstrate a continuous flow of goods moving in interstate commerce. First, the issue was not whether the Government in that case was able *to prove* that there was a continuous flow of merchandise; the issue was whether the indictment was sufficient. In the instant case, no competent evidence was presented to the lower court to indicate any continuity of orders of merchandise from the out-of-state distillers to wholesalers and then to retailers. Petitioners apparently take the position that if the goods commence their journey out of state, this single fact proves a continuous flow in interstate commerce until ultimate consumption.[12]

Neither does the case of *Las Vegas Merchant Plumbers Ass'n* v. *United States, supra,* demonstrate a conflict in circuits. In that case, the Court of Appeals for the Ninth Circuit merely held that the *indictment* stated a sufficient cause of action and that the evidence introduced by the Government was sufficient to demonstrate that the goods upon which the alleged conspiracy impinged remained in interstate commerce.[13]

The foregoing demonstrates that the reasons for granting the writ as set forth by petitioners are improperly supported. The factual findings by the district court and the affirmance thereof by the Court of Appeals for the Tenth Circuit, rather than being inconsistent with the *Walling* and *Frankfort* decisions, were based upon such

12. This view has never been adopted by any federal court to respondents' knowledge and is wholly inconsistent with the remaining authorities cited by petitioners (Supp. Br. p. 5).

13. The evidence in that case demonstrated that merchandise was shipped from out of state to wholesale contractors, retailers and even directly to the ultimate consumer. No such evidence was introduced in the instant case.

cases. Furthermore, no Court of Appeals for any other circuit has held to the contrary.

Neither the district court, which sat as the trier of fact, nor the Court of Appeals made any incorrect findings of fact, and the decision of the Court of Appeals that, *on the record in this case,* "the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce.",[14] in no measure places "undue restrictions upon the Sherman Act never contemplated by Congress or the United States Supreme Court in its *Walling* decision.",[15] as petitioners have so blatantly asserted.

Petitioners do not here assert that there was not substantial evidence to support the trial court's findings, but instead merely assert that there was some evidence to support petitioners' contentions.

This, of course, is not the test on appeal from a trial in which the trial court was the trier of fact. Under Rule 52(a), Fed. R. Civ. P., findings of fact of the trial court may not be set aside unless "clearly erroneous". If the findings of fact are supported by substantial evidence, and are not "clearly erroneous", they are binding on the Courts of Appeals and upon this Court. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Friedman* v. *Fordyce Concrete, Inc.*, 362 F. 2d 386 (8th Cir. 1966); *Todd* v. *United States*, 362 F. 2d 531 (10th Cir. 1966), *cert. denied,*

14. 377 F.2d at 903 (10th Cir. 1967); App. 3.
15. Supp. Br. p. 11, referring to *Walling v. Jacksonville Paper Company*, 317 U.S. 564 (1943).

385 U. S. 994 (1966); *Cataphote Corporation v. De Soto Chemical Coatings, Inc.*, 356 F. 2d 24, 26 (9th Cir. 1966), *cert. denied*, 385 U. S. 832 (1966).[16]

Certiorari is not a device for a second review of the record, of the evidence presented at the trial, of the findings of fact of the trial court, or of the decision of a Court of Appeals which, after review of the record to determine if there is substantial evidence to support the correctness of the trial court's factual findings, merely affirms the judgment of the trial court predicated thereon. Absent "special and important reasons therefor", certiorari will not be granted by this Court. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 73 (1955); 28 U.S.C.A. (1967 Supp.) S. Ct. R. 19.

CONCLUSION

No "special and important reasons" for granting certiorari to review the trial court's findings of fact are shown herein by petitioners. The trial court affirmatively found that petitioners had failed to prove any conspiracy; had failed to prove that the alcoholic beverages were in a

16. "Appellant, though reluctant to characterize the issue involved as one of fact, does nevertheless ground its argument on a purported demonstration of the 'clearly erroneous' nature of the district court's findings. In so doing, however, appellant disregards the severe limitations imposed on an appellate court in reviewing findings of fact. It is not our function to reevaluate the evidence presented below. We cannot substitute our judgment for the first-hand evaluation made by the trier of fact. Pursuant to Rule 52(a) . . . our obligation is to determine if the findings below were 'clearly erroneous.' This statutorily imposed standard does not vest us with power to reweigh the evidence presented at trial in an attempt to assess which items should and which should not have been accorded credibility. Our task, rather, is to determine if there exists evidence of substance to support the findings of fact of the trial court. Thus, it does not aid appellant's position on review to merely extract that evidence presented which supports its position; rather it must additionally demonstrate that no substantial evidence was presented which supports the district court findings in favor of appellee." (356 F.2d at 26 (9th Cir. 1966).)

continuous flow of interstate commerce; and had failed to prove that such alcoholic beverages affected interstate commerce. After careful review of the record, and concluding that there was sufficient evidence to support such findings of fact, the Court of Appeals affirmed.

Under such circumstances, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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November, 1967

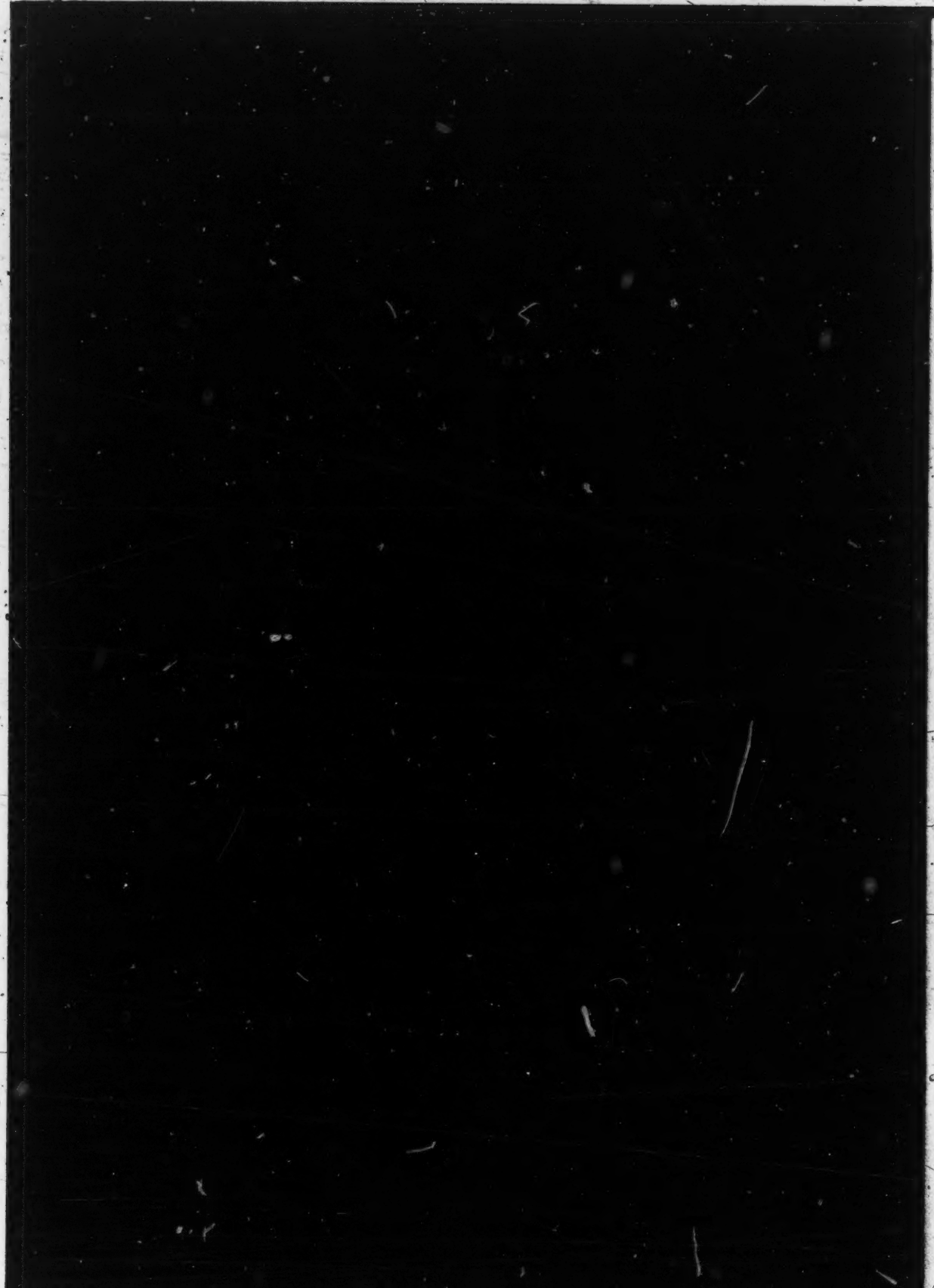
APPENDIX

15 U.S.C. § 1, provides as follows:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."





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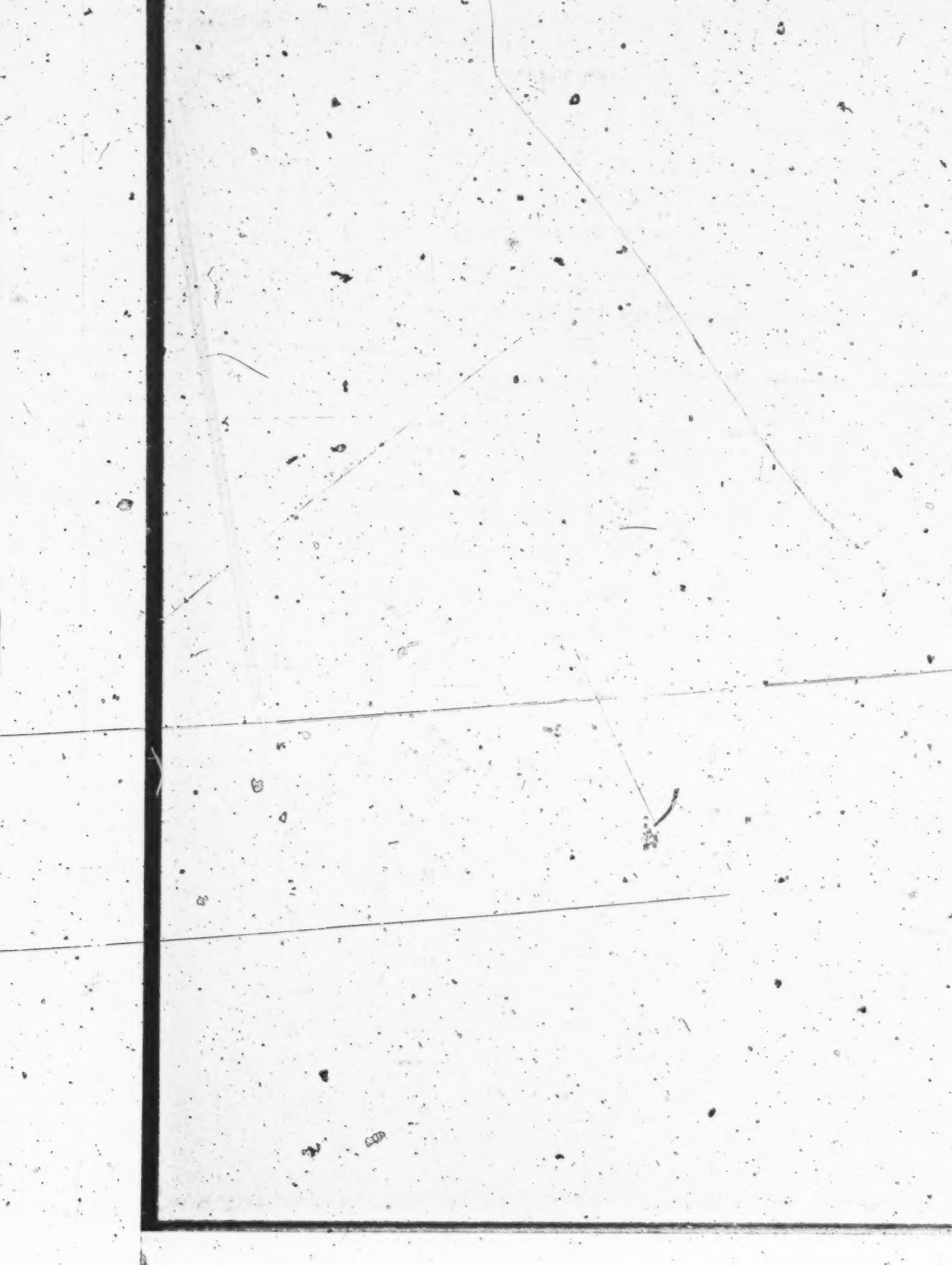
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; J. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

Petitioners,

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSON'S DISTRIBUTING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW, JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

The United States Court of Appeals, Tenth Circuit, stated in their opinion as follows:

"We affirm on the sole ground that the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." (Appendix, Page 3)

The critical issue in this case, as pointed out by the Circuit Court of Appeals, is whether the interstate movement of the alcoholic beverages ends at the wholesaler's warehouses or whether the warehousing of the alcoholic beverages is "a temporary stopover in a continual flow of commerce which terminates at some point farther down the distribution line." (Appendix, Page 5)

The Court held "that the decision on the in commerce issue is controlled by *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564." (Appendix, Page 5)

The Court then reasoned that under *Walling*, in order for petitioners to prevail in the present case, the respondent wholesaler's purchases of alcoholic beverages from out-of-state distillers must fall within one of the following three categories: "(1) to fill a special order, (2) under a contract or understanding by which the wholesaler has agreed to fill the needs of a particular customer; or, (3) to fill the anticipated needs of a particular customer although no contract or understanding to do so exists." (Appendix, Page 7)

Petitioners submit that even under the narrow construction placed on *Walling* by the Circuit Court, the evidence in this case clearly shows that the respondent wholesalers, after entering into the agreement to limit brands and territories among themselves, commenced purchasing alcoholic beverages from out-of-state distillers so as to fill the anticipated needs of their particular customers. Indeed, the very purpose of the agreement among the wholesalers was to cut inventories to a minimum and order only as necessary to meet the anticipated needs of their particular customers. As recognized by the trial court, "the arrangement that was made, or whatever it was that they (wholesalers) did, was for understandable, sound business reasons," * * * "that the tremendous load of inventories and the cost of inventories to the wholesalers was such that they had in some form or manner to reduce inventories and reduce overhead in order to stay in business; and, of course, under the law they are entitled to make a profit. All businesses are." (Transcript of Record, Page 438.)

Certainly, as the record in this case indicates, the purchasing and selling practices of the Respondent, Wholesale Liquor Dealers in Oklahoma, are far different from those of the typical local merchant such as the grocery store, drug store, or clothing merchant. The alcoholic beverages in this case cannot be classified, as the Circuit Court of Appeals has done, as the type of merchandise described by Mr. Justice Douglas in *Walling* as "goods acquired and held by a local merchant for local disposition." (Transcript of Record, Pages 7-8)

Prior to the time the wholesalers divided brands and territories among themselves, each of the wholesalers through sales personnel solicited orders from retailers in various parts of the State of Oklahoma for all of the leading brands of alcoholic beverages. Following the commencement of the territory and brand division, the wholesalers solicited and received orders for only the brands they were to handle and only in the territories in which, by agreement, they had limited their market. (See testimony of respondent wholesalers, Transcript of Record, 84-106, 107-124, 126-140, 343-358, 360-361, and see also testimony of retailers, Transcript of Record, 204-208, 208-230, 230-241, 242-268, 363-365, 366-370.)

Moreover, the evidence is undisputed that prior to the time the agreement pertaining to division of brands and territories was entered into between respondents, the out-of-state distilleries and their representatives took orders from and transported into the State of Oklahoma alcoholic beverages to all of the respondents. (There are no distilleries in Oklahoma.) After the agreement or understanding had been reached, the out-of-state distilleries and their representatives were limited to selling only to those few wholesale liquor dealers in certain agreed territories to whom their brands had, by agreement among the wholesalers, been allocated. Wholesalers who had previously dealt with certain out-of-state distilleries and their representatives refused to do so after the agreement or division of brands and territories went into effect. (See testimony of distillery representatives, Transcript of Record, 179-187, 189-196, 272-283, 285-291, 295-300, 301-304, 314-319.)

Petitioners submit that the jurisdictional element of interstate commerce is present in this case for the reason that the acts complained of, *i. e.*, those acts on the part of respondents in dividing by agreement or understanding the wholesale market for alcoholic beverages both as to brands and territories, occurred within the "flow" of commerce or "in commerce," as contemplated by *Walling*, where the Court speaks of "a practical continuity of movement of the goods until they reach the customers for whom they are intended." This "practical continuity of movement" concept of interstate commerce is also followed in *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674, *Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F. 2d 868, *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379, and *Las Vegas Merchant Plumbing Ass'n* v. *United States*, 210 F. 2d 732. These cases have followed the modern concept of interstate commerce as laid down by the Supreme Court in *Swift & Company* v. *United States*, 196 U. S. 375, in which case Justice Holmes suggested that "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business."

In attempting to prove the continuity of movement of alcoholic beverages from out-of-state distilleries through the wholesale liquor dealers to the retailers and then the ultimate consumers, petitioners offered testimony from wholesaler's employees to show procedures in soliciting orders from retailers and placing orders with distilleries outside of the State of Oklahoma. The trial judge would not

permit petitioners to fully develop their proof on this aspect of the case. The following excerpt of testimony by a wholesale liquor dealer's employee clearly shows the confusion of the trial court with respect to the "continuous flow" theory and proof of petitioners:

> "Q. Mr. Hawkins, in so far as the importation or the ordering of these brands of beverages from the distillers, would you explain to the Court the procedure in so far as the filling of the orders; in other words, how long does it take from the time you order or place an order with a distiller for you to get it?
>
> "Mr. Ungerman: Object to that as incompetent, irrelevant and immaterial.
>
> "The Court: What does that have to do with this lawsuit?
>
> "Mr. Rizley: Your Honor, our theory is, and this is the law, that we are trying to show that in so far as jurisdiction—and your Honor is concerned about jurisdiction—that this alcoholic beverages is in a continuous, under the anti-trust law, is a continuous flow from outside of the state of Oklahoma.
>
> "The Court: The Court can assume that.
>
> "Mr. Rizley: All right. No further questions.
>
> "The Court: The Court can take judicial knowledge of that." (Transcript of Record, Page 362)

Petitioners made further effort to enlighten the trial judge on the "flow" of interstate commerce or "in commerce" theory of petitioners through the testimony of the general manager for one of the wholesalers. But the Court again refused to hear testimony with respect to the evidence of "continuous flow" of alcoholic beverages from

out-of-state distilleries through Oklahoma wholesalers to retailers and to the ultimate consumers as shown by the following excerpt of testimony:

"Q. And what are your duties? A. General manager.

Q. General Manager? A. Uh huh.

Q. Do you have some authority over the orders that are issued to distilleries? A. Yes, sir.

Q. And did you when you were with Mr. Jarboe? A. Yes, sir.

Q. Mr. Wistrom, during the years you have been in business, have you handled Jim Beam? A. Certainly.

Q. And Kentucky Gentleman? A. Yes, sir.

Q. 10 High? A. Yes.

Q. And you handled most of the leading items that are offered for sale by distilleries in Oklahoma? A. Yes, most of them.

Q. Would you explain to the Court what your procedures are in keeping your stock maintained, ordering new stock and so forth?

"Mr. Undegman: Object to that, incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue.

"The Court: What is the purpose of this?

"Mr. Rizley: Well, your Honor, we have the question of the interstate movement, of these beverages. We want to show that they are in continuous flow. That's the law as we see it. This is part of our proof. We want to show what their practices are with respect to bringing it into the state of Oklahoma. It's very material.

"The Court: It strikes me that it goes without saying that it's coming in all the time. You need not prove that." (Transcript of Record, Page 429)

As shown from the excerpts above, the petitioners were led to believe by the remarks of the trial judge that sufficient evidence had been presented to satisfy the judge as to the "continuous flow" theory of the petitioners.

This is further demonstrated by the trial court's remarks when petitioners requested a finding of fact with respect to the continuous flow of alcoholic beverages from distillers outside the State of Oklahoma through the wholesalers to the retailers and to the ultimate consumers. During the argument the following remarks were made by the Court:

"The Court: Again, what is continuous? They have enough to come in to *satisfy their demand.* (Emphasis added.)

"Mr. Rizley: If your Honor was to hold then that the flow was sufficient to satisfy their demand.

"The Court: I wouldn't know. I wouldn't know about that. I think that a wholesaler is going to have or try to have *enough whiskey to meet his requests.* (Emphasis added.)

"Mr. Rizley: We would be satisfied if you would just hold that there is a continuous flow from the distillers outside to the wholesalers.

"The Court: I think that's just a play on words. The appellate court will know that if it comes in, it comes in as fast as they want it to come in and as fast as they need for it to go out. It comes in faster than it goes out because some of it is left in the warehouse." (Transcript of Record, Page 446)

Further remarks of the Court during argument on the "continuous flow" finding are as follows:

"The Court: Well, no. What I think I was trying to say was that all this whiskey comes from outside the state and it is coming in here by carload or truckload lots, *continuously, as it is used;* but then for it to go out is another thing. (Emphasis added.)

"Mr. Rizley: May we ask your Honor to do this, to state as a finding there is a continuous flow of alcoholic beverages from distillers outside the state of Oklahoma to the wholesalers.

"The Court: Well, that's in there. There isn't any question about that. That's in there.

"Mr. Rizley: I believe the evidence supports the further finding that in fact it is a continuous flow through the wholesalers to the ultimate consumer, since this moves very rapidly.

"The Court: Well, it's true, but what is the degree? It doesn't breeze through there like the spring wind.

"Mr. Rizley: Your Honor would not let us introduce evidence as to just how long. That was the type of evidence we were trying to get not only from the witness whom I just quoted but also again on the final day of hearing we attempted to—a witness testify as to the procedures showing the movement from out of the state to the retailer.

"The Court: Well, Mr. Rizley, the inventories that are filed with the Alcohol Tax Board shows what they have this month, what they had left over, what came in that month. The record is replete with evidence as to warehouse storages. That's what I was talking about.

> This Court would take judicial knowledge of the fact that it comes in, it stays in, they inventory it, the record will show what went out and what was left, month after month. I think that's what I had reference to. Am I not right about that?" (Transcript of Record, Pages 444-445)

As the Court indicated above, the record in this case contains evidence as to the volume of alcoholic beverages imported into the State of Oklahoma each month by the wholesalers. The fact that the rules of the Alcoholic Beverage Control Board require that the goods be placed in a warehouse for inventory prior to delivery to retailers does not mean that the goods have come to rest and, therefore, are no longer, "in commerce" or in the "flow" of commerce. The goods at the time they were placed in the warehouse for inventory purposes have not yet reached "their final destinations." The goods have not yet reached "the customers for whom they are intended." As the Circuit Court recognized, insofar as the regulation of goods moving in commerce is concerned, "Congress exerted the full measure of its in commerce powers." (Appendix, Page 6)

CONCLUSION

The judgment of the District Court and the opinion of the Court of Appeals for the Tenth Circuit affirming the judgment place undue restrictions upon the Sherman Act never contemplated by Congress or by the United States Supreme Court in its *Walling* decision. In order to correct this error, this Court should act favorably upon this petition for a writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BURKE ET AL. *v.* FORD AND KUNC ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 632. Decided December 11, 1967.

PER CURIAM.

Petitioners, Oklahoma liquor retailers, brought this action under § 1 of the Sherman Act to enjoin an alleged state-wide market division by all Oklahoma liquor wholesalers. The trial judge, sitting without a jury, found that there had in fact been a division of markets—both by territories and by brands. The court nevertheless entered judgment for the wholesalers because, among other reasons, it found that the interstate commerce prerequisite of the Sherman Act was not satisfied. The Court of Appeals affirmed upon the sole ground that "the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." — F. 2d —, —.

There are no liquor distilleries in Oklahoma. Liquor is shipped in from other States to the warehouses of the wholesalers, where it is inventoried and held until purchased by retailers. The District Court and the Court of Appeals found that the liquor "came to rest" in the wholesalers' warehouses and that interstate commerce ceased at that point. Hence, they concluded that the wholesalers' division of the Oklahoma market did not take place "in interstate commerce." But whatever the validity of that conclusion, it does not end the matter. For it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce. *United States* v. *Employing Plasterers Association*, 347 U. S. 186; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219.

Recognizing this, the District Court went on to find that the wholesalers' market division had no effect on interstate commerce, and the Court of Appeals agreed. The Court of Appeals held that proof of a state-wide wholesalers' market division in the distribution of goods retailed in substantial volume [1] within the State but produced entirely out of the State was not by itself sufficient proof of an effect on interstate commerce. We disagree. Horizontal territorial divisions almost invariably reduce competition among the participants. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *United States* v. *Sealy, Inc.*, 388 U. S. 350. When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers.[2] In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce.

The petition for certiorari is granted and the judgment of the Court of Appeals is reversed. The case is remanded to that court for further proceedings consistent with this opinion.

MR. JUSTICE HARLAN concurs in the result.

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[1] Between $44 and $45 million in wholesale purchases in 1964.

[2] The Court of Appeals stressed the fact that unit sales to the wholesalers increased (885,976 cases to 891,176 cases) from 1963 to 1964 while the market division was in effect. But if there had been free competition among the wholesalers—all other things being equal—presumably sales to them would have increased even more.

The increase in liquor sales noted by the Court of Appeals was 0.6%; during the same period total personal income in Oklahoma increased from $4,880 million to $5,220 million, an increase of 7.0%. Table 1, Survey of Current Business, Office of Business Economics, Department of Commerce (August 1967). Adjusting for concurrent price inflation (see Table 81, Survey of Current Business (July 1967)), the increase in real personal income was approximately 5.7%.